RARY,
PREME COURT, U. S.

MAR 15 1974

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No. 73-1264

BETTY M. ALLEN a/k/a BETTY J. MINDER
and
RICHARD P. ALLEN

Petitioners,

v.

1901 WYOMING AVENUE COOPERATIVE ASSOCIATION

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

STUART H. ROBESON
1828 Jefferson Place, N.W.
Washington, D.C.
659-2720

Attorney for Respondent

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTIONS PRESENTED	1
STATEMENT OF THE CASE	2
ARGUMENT	4
CONCLUSION	9
APPENDIX	1a

TABLE OF AUTHORITIES

Cases:

Brooking v. Lemon, 96 A.2d 849 (1953) 8

Chesapeake & Ohio Canal Co. v. Ray, 101 U.S. 522 8

District of Columbia v. Camden Iron Works, 181 U.S. 453, 45L.Ed. 948 8

Hart v. Chenner, 178 A.2d (1962) 8

Haynes v. D.C. 202 A.2d 919 8

Justice Court Coop. v. Sandow, 270 N.Y.2d 829 8

Lee v. 1901 Wyoming Avenue Coop. Association, CA No. 5915-72 in Superior Court for the District of Columbia, not reported 8

1901 Wyoming Avenue Coop. Association v. Betty M. and Richard P. Allen, CA No. 5670-71 in Superior Court for the District of Columbia, not reported 4

1901 Wyoming Avenue Coop. Association v. Lee, CA No. 3669-71 in Superior Court for the District of Columbia, not reported 4

Richardson v. Flood, D.C. App. 190 A.2d 259 8

Shipp v. Weaver, 75 A.2d 925 (1950) 8

Soffas v. Eston, 80 U.S. App. D.C. 306, 152 F.2d 682 8

Statute:

28 U.S.C. 1254(1) 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-1264

BETTY M. ALLEN a/k/a BETTY J. MINDER
and
RICHARD P. ALLEN

Petitioners,

v.

1901 WYOMING AVENUE COOPERATIVE ASSOCIATION

Respondent.

BRIEF FOR THE RESPONDENT IN OPPOSITION

JURISDICTION

28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the respondent has the right to enforce the by-laws, rules, and regulations of the Association, under the terms of the Mutual Ownership Contract?

2. Whether a reasonable surcharge for subleasing constitutes an abridgement of equity rights guaranteed by said contract?

3. Whether the respondent is liable in tort for malicious prosecution and abuse of legal process?

4. Whether the petitioners bilaterally waived or agreed to the levying of an appropriate rental surcharge by their contractual acceptance of the Association's Rules and Regulations; by their unsuccessful effort, while on the Board of Directors, to make the subleasing surcharge even more stringent; and by their initial compliance with the relevant regulation by making approximately twelve monthly payments of the rental surcharge, prior to discontinuing same?

STATEMENT OF CASE

The petitioners are owners of a cooperative apartment in the respondent's 1901 Wyoming Avenue Cooperative Association. At the time the petitioners purchased their apartment, they signed a Mutual Ownership Contract which allowed them to "sublease (their) dwelling, provided that (their) tenant be first approved by the directors of the Association" (Pet. App. 2, paragraph 7, page 17). Likewise, in this same Mutual Ownership Contract, the petitioners agreed to "abide by the Rules & Regulations of the Association" (Pet. App. 2, paragraph 13, page 18). Also, the By-laws of this Association and the Application for the transfer of this apartment to the petitioners required them to abide by the By-laws and all Rules and Regulations; and this is spelled out "as a condition of membership" in the By-laws (Pet. App. A3, Article 5, Section 4, Page 21 and App. 1, page 15).

On April 30, 1959, the Association adopted a regulation, at a special meeting of its membership, whereby any member who would rent his or her apartment would have to pay a monthly surcharge of 75¢ per $1,000 of original valuation. The petitioners purchased their apartment on April 15, 1964, approximately five years after the above

regulation was adopted by the members of the Association (Pet. App. 10, page 39). The original valuation of their apartment was $10,500, so that their rental surcharge would be $7.88 per month. The total amount due at the time the lower court rendered its judgment against them was only $133.96 (Pet. App. 10, pages 39-40).

In addition to the above-mentioned basic surcharge, the Association in 1965 levied an escalator provision, whereby the monthly rental surcharge would be raised to 50% of the monthly operating charge if an apartment were rented for more than three years. At the time the original Complaint was filed, the petitioners were being billed for only the basic rental surcharge, inasmuch as their apartment had been rented for several months less than three years. However, due to an administrative error while the Complaint was being prepared, the rental period was erroneously computed as having started more than three years previously, and this erroneous computation was incorporated in paragraphs 3 and 4 of the original Complaint. The respondent made a similar administrative error in preparing a Complaint against another member of the Association who had likewise seen fit to refuse to pay the rental surcharge, despite prolonged and patient efforts on the part of the Board of Directors to have both refractory members live up to their contractual obligation in this matter. Upon becoming cognizant of these parallel administrative errors, the respondent endeavored to amend its Complaint so as to charge the delinquent members for having "failed to pay the appropriate rental surcharge," which in both cases obviously referred to their failure to pay the basic rental surcharge of 75¢ per $1,000 of original valuation. The diverse results of this double effort on the part of the respondent to amend the original Complaints will be discussed below, inasmuch as the petitioners rely heavily

on the parallelism between these two efforts and the allegedly contradictory judicial decisions connected therewith. (Pet. App. 6, page 29 & 30; page 10 of Petitioner's Brief, III Consequence).

The petitioners rented their apartment from July 15, 1969 to December 15, 1971. They paid this monthly rental surcharge from July 15, 1969 to July 15, 1970 (12 months); they have not paid it since then (Pet. App. 10, pages 39-40).

ARGUMENT

The petitioners claim that the Supreme Court should take cognizance of this case because lower trial courts have taken opposite positions on this and the allegedly identical case mentioned above. This argument runs throughout the brief of the petitioners as a persistent refrain, and it is imperative that their allegation of identicity in this matter be rebutted *ab initio*. The simple fact is that Judge Tim Murphy, in *1901 Wyoming Avenue Cooperative Association v. Lee* (CA No. 3669-71), in the Superior Court of the District of Columbia (Pet. App. 8), refused to grant the respondent's motion to amend its Complaint, on the score that its counsel had deliberately chosen this approach by way of a "tactical trial decision." On the other hand, Judge W. Byron Sorrell, in *1901 Wyoming Avenue Cooperative Association v. Betty M. and Richard P. Allen* (CA No. 5670-71), in the Superior Court of the District of Columbia, granted the respondent's motion to amend its Complaint (Pet. App. 44), thereby permitting trial on the merits of the basic rental surcharge. As a result, Judge Murphy's ruling as to the unacceptability of the *escalator* rental surcharge (50% of the monthly operating charge, $42 for the Allen apartment), was by no means in conflict with Judge Sorrell's ruling as to the acceptability of the *basic* rental surcharge

(less than 10% of the monthly operating charge, or $7.88 for the Allen apartment). The obvious difference is simply that Judge Sorrell ruled that the 10% basic rental surcharge is reasonable, while Judge Murphy ruled that the 50% escalator rental surcharge is unreasonable. The two rulings differ in substance as well as degree—a point which was conveniently overlooked by the petitioners in alleging that they are "identical" cases. It should be noted that the respondent complied with Judge Murphy's ruling and rescinded the escalator surcharge, whereas, pursuant to Judge Sorrell's finding, as sustained on appeal, the basic surcharge continues in effect. Incidentally, this is quite in keeping with Judge Murphy's specific collateral finding that the intent of his ruling was to disallow only the escalator surcharge, since he specifically affirmed that "any other charges remain unimpaired" (Clarifying Order in CA No. 5669-71, dated April 17, 1972 (Rep. App. A)).

It is respectfully suggested that, far from being "almost identical," the above-cited cases differ essentially, since the respective rental surcharges which were adjudicated therein differ as between 50% and less than 10% of the monthly operating charge. The respondent confesses that it is somewhat shocked to read the allegation (on page 6) that its initial Complaint, incorporating the above-described administrative error, was "maliciously designed to obfuscate the issues involved and prejudice the court decision," contrary to the facts as outlined above. Incidentally, the petitioners should well have realized that this was a simple administrative error, since the entire tenor of the prolonged negotiations to achieve amicable settlement of this dispute, prior to the institution of legal action, was related solely to resumption of payment of the basic rental surcharge which they had ceased paying.

Further, it is difficult to perceive how the levying of such a minor surcharge could be accurately described as a "coercive attempt" by the respondent "to extort money from" or "intimidate" the peitioners. As to the alleged violation of the contractual right of the petitioners to sublease their apartment, subject only to the Association's approval of their prospective tenant, the levying of a small surcharge in the event of such rental would not only appear to be nonviolative of their contractual right but fully in conformity with the established practice of rental management in this vicinity.

The respondent is particularly concerned about the manner in which the petitioners have impugned the integrity of the trial judge in the lower court, as well as of the appellate judges. On page 7 of their Petition, they blatantly accuse Judge Sorrell of a number of judicial improprieties, with the clear implication that he was prejudiced in favor of the respondent. In addition, they accused him (Pet. p. 10) of failing to recognize or acknowledge Mrs. Allen's physical, mental, and monetary losses, including the loss of her tenants because of alleged harassment by the respondent. Further, the petitioners apparently regard the D.C. Court of Appeals as having wronged them by denying their Petition for Rehearing (Pet. p. 8) "without *explanation* or *opinion* in support of the decision" (emphasis in original). Of lesser moment, but in the same vein, the petitioners appear to be piqued that their Petition for Rehearing was denied "not by a Judge of the Court buy by a Clerk of the Court." In view of the fact that the petitioners are acting *pro se* in this case, a certain amount of indulgence may be called for because of their understandable failure to realize how a Clerk of the Court may properly act for a Judge *per curiam*.

Perhaps the most serious flaw in the Petition for Writ of Certiorari is the expectation that this question is "particularly important for a Supreme Court decision because of diametrically conflicting decisions made on an identical issue before inferior courts" (Pet. p. 3). As noted above, the "conflicting" decisions were on substantially disparate issues in the well-trodden field of contract law, so that no interposition by the Supreme Court would appear to be called for in this matter. Further, it is absurd to regard this case as involving a violation of Article IV of the Bill of Rights, since there is no scintilla of evidence regarding "unreasonable search and seizures of personal property" by the respondent (Pet. p. 5). In addition, it is difficult to perceive how the Supreme Court should take cognizance of this case in order to protect "the equity rights of individual owners against the abuse of power by cooperative or condominium management" (Pet. p. 4); no evidence whatsoever has been adduced to establish improper motivation on the part of the voluntary and unpaid members who generously serve on the Association's Board of Directors. In fact, the respondent Association depends on the collective efforts of its fifty-seven members to run and maintain this cooperative building and to conduct the Association's affairs without pay. How else could a cooperative apartment be run? The unavailability of absentee owners to participate in the active operation of the Association deprives it of their cooperative services and imposes an inequitable burden upon the others who must serve as watchdogs for their absent associates. Thus, the petitioners should not complain of the modest rental surcharge, particularly inasmuch as they are undoubtedly making a substantial profit from subleasing their apartment.

The petitioners also depend on the ruling of a lower court in the case of *Lee v. 1901 Wyoming Avenue Cooperative Association* (C.A. 5915-72), by Honorable John R. Hess. This is a case of breach of contract. It was for Partial Summary Judgment, and it is not a final judgment as of this date.

In short, the basic rental surcharge is "reasonable" and "modest," as held by Judge Sorrell, and it does not regulate the "mode" of living of the occupants (Pet. App. 10, pages 5-6). *Justice Court Coop. v. Sandow*, 270 N.Y.2d 829.

Since the petitioners made twelve monthly payments on this surcharge, it would appear that they have waived any objection to this regulation. *District of Columbia v. Camden Iron Works*, 181 U.S. 453, 45 L.Ed. 948 and *Chesapeake and Ohio Canal Co. v. Ray*, 101 U.S. 522.

The petitioners claimed that the respondent is liable in tort for malicious prosecution and abuse of legal process (Pet. App. 7, pages 33-34). Their suit is based on *one* civil suit, not *two*. In *Brooking v. Lemon*, 96 A.2d 849 (1953), the court said:

> "It being settled in this jurisdiction that one who *twice sues* another maliciously and without probable cause is responsible to him in damages: *Soffas v. Eston*, 80 U.S. App. D.C. 306, 152 F.2d 682 . . . " (emphasis added).

This case should not be reversed unless "the judgment is plainly wrong or without evidence to support it." D.C. Code (1973), Title 17-305(a); *Richardson v. Flood*, D.C. App. 190 A.2d 259; *Hart v. Chenner*, 178 A.2d (1962); *Shipp v. Weaver*, 75 A.2d 925 (1950); *Haynes v. D.C.*, 202 A.2d 919.

CONCLUSION

This case does not involve a federal question of substance. It is not a federal statute. It is only an unimportant question of a "modest" surcharge on a cooperative apartment when the owner wants to rent. There is no conflict in the decisions of two different court of appeals. The most is a difference of opinions of two trial judges; one case (not a final decision) was distinguished by the trial judge in the case at bar, which has been sustained on appeal.

The petitioners have not cited any decisions of the U.S. Supreme Court that are in conflict with the opinion of the lower Court.

This case does not encompass any imperative public importance as to justify the acceptance of this case. It involves a judgment of only $133.96 (Pet. App. 10, page 45).

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

STUART H. ROBESON
1828 Jefferson Place, N.W.
Washington, D.C. 20036
Phone (202) 659-2720

Attorney for Respondent

APPENDIX A

SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA
CIVIL DIVISION

1901 WYOMING AVENUE COOPERATIVE
ASSOCIATION

v. Civil Action No. 5669-71

MARGARET D. LEE

CLARIFYING ORDER

Plaintiff herein has filed a motion to clarify the Court's order of March 8, 1972, asserting that it is unclear which particular rental surcharge has been held to be unenforceable.

Having reviewed the record herein, the Court reaffirms that Order as relates to the 50% additional rental surcharge passed on July, 1965. That is the only surcharge challenged by defendant in her motion for summary judgment. *Therefore, any other charges remain unimpaired.*

SO ORDERED.

Tim Murphy, Judge

April 17, 1972

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were mailed to Stuart H. Robeson, Esq., 1828 Jefferson Place, N.W., Washington, D.C. 20036; and Michael Rauh, Esq., 1910 Sunderland Place, N.W., Washington, D.C. 20036; this 17th day of April, 1972.

Tim Murphy, Judge